in the exercise of the police powers of the state, the legislature enacts a statute, for the protection of the public health, welfare or morals, merely prohibiting an otherwise lawful act without reference to intent. Even in such cases some courts read "knowingly" into the statute and permit the defense of mistake of fact. *Gordon* v. *State,* 52 Ala. 308; *Squire* v. *State,* 46 Ind. 459; *Stern* v. *State,* 53 Ga. 229; *Farrell* v. *State,* 32 Oh. St. 456; *Reg.* v. *Sleep,* 8 Cox C. C. 472. However, the trend of modern authority is towards a literal interpretation of such statutes. *People* v. *Johnson,* 288 Ill. 442; *Com.* v. *Mixer,* 207 Mass. 141, 31 L. R. A. (N. S.) 467; *Welch* v. *State,* 145 Wis. 86; *People* v. *D'Antonio,* 150 N. Y. App. Div. 109; *Walters* v. *State,* 174 Ind. 545; *People* v. *Hatinger,* 174 Mich. 333. See also *Rex* v. *Wheat,* [1921], 2 K. B. 119, and the note thereon, *supra.* But where the legislature uses the word "knowingly," "wilfully," or some other word of similar import, the cases appear to be uniform in requiring proof of guilty intent and permitting mistake of fact to excuse. *Com.* v. *Flannelly,* 81 Mass. 195; *Masters* v. *U. S.,* 42 D. C. App. 350; *State* v. *Snyder,* 44 Mo. App. 429; *Verona Central Cheese Co.* v. *Murtaugh,* 50 N. Y. 314; *Brown* v. *State,* 137 Wis. 543; *Brown* v. *State,* 43 Tex. 478; *Bonker* v. *People,* 37 Mich. 4. That the word "wilfully" as employed in statutory criminal law necessarily implies a guilty mind, see *Withers* v. *Steamboat El Paso,* 24 Mo. 204; *Brown* v. *State,* 137 Wis. 543; *Masters* v. *U. S., supra; Kendall* v. *State,* 9 Ga. App. 794. In reversing the decision of the justices in the instant case, the court say in effect that because the killing was not accidental and D admittedly shot intending to kill that particular bird, the act was both 'wilful and unlawful." The *dictum* in one case was the only authority cited. *Taylor* v. *Newman,* 4 B. & S. 89. There P's pigeons were in the habit of feeding on D's crops, and D, after giving P warning, shot one of them while so feeding, believing he had a right to do so. As a conviction was quashed in that case, Judge Mellor saying, "I think that it was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right," it is at least doubtful authority for the conclusion arrived at by the court in the instant case. It is submitted that neither reason nor authority justifies the strict view taken by the court in refusing to admit mistake of fact, with the usual qualifications, as a defense. The statute is not in the nature of a police regulation designed in the interest of the public, and it expressly gives scope to the criminal intent.

CRIMINAL LAW—TRIALS—RECOMMENDATION OF MERCY.—An Ohio statute (Gen. Code, Sec. 12,400) provides that "whoever * * * kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life." In a prosecution for murder in the first degree the court charged the jury "to consider and determine whether or not, *in view of all the circumstances and facts leading up to and attending the alleged homicide as disclosed by the evidence,* you should or should not make such recommendation." The charge was objected to on

the ground that in the portion italicized the court invaded the function of the jury. On error, it was *held* (Robinson and Wanamaker, JJ., dissenting) that the instruction was proper. *Howell* v. *State,* (Ohio, 1921), 131 N. E. 706.

The dissenting judges took the view that by the action of the legislature there had been vested in the jury, so far as choice between punishment by death and life imprisonment was concerned, a discretion wholly unlimited and beyond the court's control. They also disagreed with the majority in the interpretation of *Winston* v. *United States,* 172 U. S. 303, 19 Sup. Ct. 212, 43 L. Ed. 456, a case much relied upon in the prevailing opinion, and in which are to be found pronouncements favoring each side. The weight of authority is probably with the court's decision. *Inman* v. *State,* 72 Ga. 269; *Duncan* v. *State,* 141 Ga. 4; *State* v. *Bates,* 87 S. C. 431; *State* v. *Carrigan,* (N. J.), 108 Atl. 315. Squarely opposed to the prevailing view is *Vickers* v. *United States,* 1 Okl. Cr. 452. Among the cases that may be cited as supporting the dissent, but which are found on close examination to be either mere dictum or standing merely for the doctrine that the court must not attempt to tell the jury *how* to exercise their discretion, are *People* v. *Kamaunu,* 110 Cal. 609 (see *People* v. *Ross,* 134 Cal. 256; *People* v. *Rogers,* 163 Cal. 476); *State* v. *Thorne,* 39 Utah 208 (see *State* v. *Mewhinney,* 43 Utah 135); *State* v. *Ellis,* 98 Oh. St. 21. Since the judge in cases where the legislature has fixed only minimum and maximum penalties exercises an uncontrollable and unreviewable discretion in passing sentence, it is reasonably arguable that the jury in such a situation as was presented in the principal case should have a like freedom: if the judge in the former case may be guided in fixing sentence by what has come to him, let us say, in a vision, why should the jury in the latter case be confined to the facts and circumstances of the case as disclosed by the evidence?

INSURANCE—EFFECT OF DEATH OF INSURED BEFORE THE PERIOD SPECIFIED BY THE "INCONTESTABILITY" CLAUSE EXPIRES.—An insurance policy read: "This policy shall be incontestable after one year from its date except for non-payment of premiums." The insured died within the year. Action was brought on the policy and the insurer defended, alleging false warranties of the insured in answering questions material to the risk. The answer was not filed until after one year from the date of the policy. Plaintiff contended that the defense was barred by the operation of the above clause. Defendant contended that the rights of the parties became fixed at the death of the insured, and since the policy was then contestable it should continue so indefinitely; hence, false warranties should avoid the policy. *Held,* admitting the existence of fraud, the clause continued operative after the death of the insured, the time within which to contest the policy had expired, and plaintiff may recover. *Plotner* v. *Northwestern National Life Insurance Co.,* (N. D., 1921), 183 N. W. 1000.

The question involved is nearly new. It is well settled that the "incontestable" clause will bind the insurer even in the face of fraud if the period stipulated has run before the death of the insured. See cases cited in 6 A. L. R. 448. But when, as in the principal case, the insured dies before the